United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7633

United States Court of Appeals

FOR THE SECOND CIRCUIT

B
P/S

ROBERT HIGH,

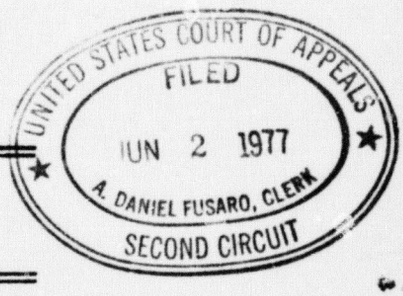
Plaintiff-Appellant,

—v.—

SABENA BELGIAN WORLD AIRLINES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



REPLY BRIEF FOR APPELLANT

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SERVICE TO DEFENDANT
BY U.S. MAIL
6/2/77
Robert High

TABLE OF AUTHORITIES

CASES:

THE PRIMARY OBJECTIVE BY THE PLAINTIFF,IN THIS ACTION FROM THE OUTSET BACK IN FEB.1971,WAS TO HAVE AN AFFRIMATIVE ACTION PROGRAM STARTED AFTER DEFENDANT MET WITH THE PLAINTIFF AND THIS CO-WORKER AND PROMISED TO HIRE MORE MINORITIES BUT NEVER FILLED THE PROMISE.

THE STATISTICAL DISPARITY BETWEEN THE NUMBER OF MINORITY GROUP MEMBERS IN THE DEFENDANT WORK FORCE AS COMPARED TO THEIR PROPORTION IN THE GENERAL POPULATION WITHIN THE RELEVANT LABOR MARKET AREA IS 3.4% EMPLOYED COMPARED TO 36% OF THE LABOR MARKET.

DEFENDANT HAS A HISTORY OF RACIAL DISCRIMINATION, PRIOR TO THE PLAINTIFF EMPLOYMENT WITH THE DEFENDANT TWO OTHER BLACK EMPLOYEES FILED CHARGES OF RACIAL DISCRIMINATION AGAINST THEM.IN 1967 MR.WALTER CHRISTIAN,WHO WAS EVENTUALLY FIRED AND IN 1968 MR.OMEE JONES FILED CHARGES.ALL WITH THE NEW YORK STATE HUMAN RIGHTS COMMISSION.

MR.FRED BECTON,A CURRENT BLACK EMPLOYEE,HAS A CIVIL RIGHTS CASE PENDING AGAINST THE DEFENDANT INVOLVING HIS DISCHARGE .

THE PLAINTIFF AND MR.BECTON WERE BOTH DISCHARGED FOR THEIR MEETING WITH THE PERSONNEL MANAGER AND OBJECTING TO THE DEFENDANT'S DISCRIMINATORY PRACTICES.

THE 1964 CIVIL RIGHTS ACT (42 U.S.C. §2000e-3) SEC.704.(a)
"IT SHALL BE AN UNLAWFULL EMPLOYMENT PRACTICE FOR AN EMPLOYER TO DISCRIMINATE AGAINST ANY OF HIS EMPLOYEES OR APPLICANTS FOR EMPLOYMENT,.....BECAUSE HE HAS OPPOSED ANY PRACTICE MADE UNLAWFUL EMPLOYMENT PRACTICE BY THIS TITLE,OR BECAUSE HE HAS MADE A CHARGE,TESTIFIED,OR PARTICIPATED IN ANY MANNER IN AN INVESTIGATION,PROCEEDING,OR HEARING UNDER THIS TITLE."

THREE OUT OF FOUR BLACK EMPLOYEES WHO FILED DISCRIMINATION CHARGES AGAINST THE DEFENDANT;WERE EVENTUALLY FIRED. TWO OF THE FIRINGS WERE SO UNJUST,THAT THEY WERE REINSTATED BACK TO WORK THROUGH THE UNION GRIEVANCE PROCEDURES.THE OTHER CASE IS STILL PENDING.

THE DEFENDANT IS BEING ENCOURAGED TO CONTINUE HIS ACTS OF SEGREGATING HIS WORK FORCE,DISCHARGING ANYONE WHO OPPOSES HIS POLICIAL VIEWS,MAINTAINING A DISPARITY IN ITS WORK FORCE AND PHYISCALLY ASSAULTING ANYONE WHO REFUSES TO TAKE A BRIBE,AS IN THE CASE OF THE UNION CHAIRMAN.

THE COURT BELOW HELD:

"THERE IS NO BASIS,HOWEVER,FOR A FINDING THAT THE ABSENCE OF IMPROVEMENT REFLECTED ACTIVE DISCRIMINATION ON THE PART OF SABENA UNLESS DISCRIMINATION WAS IMPLICIT IN THE COMPOSITION OF THE WORK FORCE."

THE WORK FORCE OF DEFENDANT AT KENNEDY AIRPORT IS COMPOSED AS FOLLOWS:

MAMAGEMENT PERSONNEL .....NO BLACKS

SUPERVISORS .....NO BLACKS

OPERATIONS .....NO BLACKS

TICKET AGENTS.....NO BLACKS

MAINTAINCE MECHANICS ..... NO BLACKS

CARGO DEPT. ..... 4 BLACKS

PRIVATE SECRETARIES.....NO BLACKS

DEFENDANT EMPLOYEES 119 WORKERS AT KENNEDY AIRPORT, ONLY 3.4% ARE BLACK,AND ALL 4 OF THE BLACKS WORK IN THE LOWEST DEPT.THE CARGO DEPT. 2 CARGO AGENTS AND 2 WAREHOUSEMEN.NONE OF THE FOUR WERE HIRED UNTIL AFTER THE EFFECTIVE DATE OF THE 1964 CIVIL RIGHTS ACT. PRIOR TO THAT DATE,DEFENDANT OPERATED AN ABSOLUTE COLOR BAR.

DISCRIMINATION IS DEFINITELY IMPLICIT,IN THE COMPOSITION OF DEFENDANT'S WORK FORCE.

42 U.S.C.§§ 2000e-2 (SEC.703) (a)

" IT SHALL BE AN UNLAWFUL EMPLOYMENT PRACTICE FOR AN EMPLOYER-(2) TO LIMIT,SEGREGATE,OR CLASSIFY HIS EMPLOYEES IN ANY WAY WHICH WOULD DEPRIVE OR TEND TO DEPRIVE ANY INDIVIDUAL OF EMPLOYMENT OPPORTUNITIES OR OTHERWISE ADVERSELY AFFECT HIS STATUS AS AN EMPLOYEE,BECAUSE OF SUCH INDIVDUAL'S RACE,COLOR RELIGION,SEX OR NATIONAL ORIGIN"

THE RACIAL COMPOSITION OF DEFENDANT LABOR FORCE IS ITSELF RESTRICTIVE OR EXCLUSIONARY PRACTICES.

THE COURT BELOW ERRED WHEN IT HELD:

"THE EVIDENCE COMPELS THE CONCLUSION THAT IN THIS AREA THERE WAS NO OVERT DISCRIMINATION AND NO EXPRESSION OF DISCRIMINATORY SENTIMENT ON SABENA'S PART."

THE COURT BELOW HELD THAT THE PLACING OF AN EXTRA PIECE OF FREIGHT ON THE PLAINTIFF TRUCK TO TEST HIS HONESTY, WAS ILL ADVISED,BUT NOT DISCRIMINATORY.THIS IS ANOTHER ACT IN WHICH THE PLAINTIFF WAS THE FIRST TO EVER BE TESTED IN SUCH A MANNER.THE EEOC INVESTIGATORS COULD NOT FIND ANY WHITE EMPLOYEES WHO WERE SO TESTED NOR COULD DEFENDANT PRODUCE ANY WHITE EMPLOYEES WHO WAS SO TREATED.

ONCE THE PLAINTIFF ESTABLISHED A PRIMA FACIE CASE THE BURDEN OF PROOF THEN SHIFTS TO THE DEFENDANT TO ARTICULATE SOME LEGITIMATE REASON FOR TESTING AN EMPLOYEE HONESTY. AT THE TIME OF THE TEST,THE PLAINTIFF WAS DOING

INTERLINE TRANSFERS.DEFENDANT NOW HAS THE BURDEN OF SHOWING WHAT WAS EVER STOLEN IN THE PAST,TO WARRENT SUCH AN ACT. THE FACT IS NOTHING HAS EVER HAPPENED ON INTERLINE TRANSFERS TO ESTABLISH AN HONESTY TEST.

ON THE QUESTION OF SICK LEAVE AND DISCHARGE,THE PLAINTIFF A UNION MEMBER AND A PARTY TO THE COLLECTIVE BARGAINING AGREEMENT WITH THE COMPANY,WAS DISCHARGED WITHOUT CAUSE ON MAY 18,1972.THE SICK LEAVE POLICY PROVIDES FOR THIRTY PAID SICK DAYS A YEAR.UNTIL MAY 18,1972 THE PLAINTIFF ONLY HAD FIVE FULL AND THREE PARTIAL DAYS OUT SICK.(EX.A) PLAINTIFF (EX.7) SHOWS 18 WHITE EMPLOYEES WITH 7 OR MORE SICK DAYS FOR THE SAME PERIOD OF TIME,SOME AS HIGH AS 23. IN LIGHT OF THE PLAINTIFF EEOC CHARGE AGAINST DEFENDANT FILED A YEAR EARLIER,ON FEB.24,1971 WHICH DEFENDANT WAS INFORMED OF,DEFENDANT ATTEMPTED TO COVER-UP DISCHARGING THE PLAINTIFF BY ALSO DISCHARGING A WHITE EMPLOYEE ON THE SAME DAY MAY18,1972.THAT ACT WAS DESIGNED TO SHOW THE EEOC INVESTIGATORS THE PLAINTIFF WAS NOT DISCHARGED BECAUSE OF HIS RACE. IN THE ENTIRE HISTORY OF DEFENDANT,NO TWO EMPLOYEES WERE EVER DISCHARGED ON THE SAME DAY BEFORE MAY 18,1972.

THE ACT OF DISCHARGE BY THE DEFENDANT WAS RULED UNJUST BY JUDGE D.GUTMAN AND BOTH PLAINTIFF AND MR.ROVECCIO THE WHITE EMPLOYEE WERE REINSTATED AFTER EIGHT MONTHS. DEFENDANT DENIED THE PLAINTIFF UNEMPLOYMENT INSURANCE AND HE LOST ALL OF HIS ASSETS.

THE COURT HELD THAT :"TWO OTHERS MIKE ROVECCIO AND G.YOUNG WERE CHARGED AT THE SAME TIME PLAINTIFF WAS CHARGED" (EX.C.) WILL SHOW WHERE YOUNG WAS NOT CHARGED AT THE SAME TIME AS THE COURT STATED.

IT ALSO HELD,"THERE WERE OTHERS WHO WERE AT ONE TIME OR ANOTHER TERMINATED,AND THEN REINSTATED BUT ONLY AFTER SERIOUS DISCIPLINARY LOSSES.THESE INCLUDED CANTELMO,FICTEN(CORRECTLY SPELLED FICHTER)AND LIPPO.NONE OF WHOM WAS A BLACK MAN."

THE COURT ERRED,FICHTER WAS NEVER REINSTATED AND CANTELMO DID NOT SUFFER LOSSES,HE RECEIVED BACK PAY.

THE COURT STATED :

THE SUPREME COURT DECLARED THAT CONGRESS HAS "PLACED ON THE EMPLOYER THE BURDEN OF SHOWING THAT ANY GIVEN REQUIREMENT HAS A MANIFEST RELATIONSHIP TO THE EMPLOYMENT IN QUESTION. RELATED TO THE EMPLOYERS BURDEN OF PROVING A MANIFEST RELATIONSHIP BETWEEN A TEST AND A JOB ARE THE EEOC GUIDELINES OF EMPLOYER SELECTION PROCEDURES, WHICH THE SUPREME COURT HAS ACCEPTED "AS EXPRESSING THE WILL OF CONGRESS"

(401 U.S. at 432,91 S.CT. at 854.)

IN THE PROCEEDINGS BELOW THE BURDEN OF PROOF NEVER SHIFTED TO THE DEFENDANT TO VALIDATE THE TESTING. UNLESS A TEST IS PROPERLY VALIDATED,DEMONSTRATING A MANIFEST RELATIONSHIP BETWEEN THE TEST AND THE JOB,USE OF THE TEST IS UNLAWFUL.

(WESTERN ADDITION COMMUNITY ORGANIZATION V.ALIOTO, 360 F.SUPP.733 (N.D.CAL. 1973):

PLAINTIFF HAD ALWAYS BEEN IN GOOD STANDING WITH THE UNION THE FOUR YEARS PRIOR TO HIS DISCHARGE ON MAY 18,1972. THE DEFENDANT BY SCHEME AND DESIGN HAD THE PLAINTIFF SUSPENDED AND FINED BY THE UNION ON MAY 15,1972. DEFENDANT ,UNDER THE ASSUMPTION PLAINTIFF HAD NO UNION PROTECTION, THREE DAYS LATER FIRED THE PLAINTIFF. THE UNION INTERNATIONAL HEADQUARTER LEARNED OF THE CONSPIRACY, ORDERED THE UNION CHAIRMAN MR.BERNSTEIN TO CANCEL THE ILLEGAL FINE AND SUSPENSION GIVEN TO THE PLAINTIFF,AND PROCESS THE DISCHARGE BY THE GREIVANCE PROCEDURES. MR.BERNSTEIN INFORMED THE DEFENDANT OF THE PLAINTIFF REINSTATEMENT TO THE UNION,AND DEFENDANT ATTEMPTED TO BRIBE MR.BERNSTEIN IF HE WOULD DROP THE GREIVANCE AND NOT GET THE PLAINTIFF'S JOB BACK. MR.BERNSTEIN REFUSED THE BRIBE AND WAS PHYSICALLY ASSAULTED BY DEFENDANT MANAGEMENT (MR.BERNSTEIN TESTIFIED TO THESE FACTS AT THE TRIAL)

FOR OVER TWO YEARS PLAINTIFF RECEIVED LETTERS OF WARNINGS LETTERS OF SUSPENSION AND FINAL WARNINGS,AS A PRETEXT ON THE PART OF DEFENDANT TO DESIGN A DISCHARGE CASE.PLAINTIFF NEVER VIOLATED THE ARGEEMENT BETWEEN MANAGEMENT AND UNION ON THE SICK LEAVE POLICY.PLAINTIFF WAS <u>IMPROVING</u> HIS SICK ATTENDEACE AT THE RATE OF 25 % A YEAR WHEN HE WAS FIRED IN 1972. (EX.A)

DEFENDANT,WHO MAINTAINS SICK LEAVE RECORDS,COULD NOT INTRODUCE ANY SICK DATES OF PLAINTIFF AND SHOW WHAT ALLEGED HOLIDAYS THEY WERE CONNECTED TO.AT THE ARBITRATORS HEARING (EX.A) DEFENDANT AGAIN COULD NOT SHOW ANY ALLEGED SICK LEAVE HOLIDAY CONNECTION.THE ACCUSATIONS WERE MADE AT THE TRIAL BELOW,BUT WERE NEVER SUBSTANTIATED.

NO RECORDS ARE KEPT ON EMPLOYEES REASONS FOR LATENESS, DEFENDANT DID NOT PRESENT ANY FORMS WHICH ARE REQUIRED TO FILL OUT FOR LATENESS,THE FORMS AND EXPLANATIONS DO NOT EXIST.

DEFENDANT ATTEMPTED TO ASSOCIATE THE PLAINTIFF WITH AN ALLEGED MISSING SHIPMENT,UNDER THE PRETEXT THAT AN UNNAMED INFORMER,WAS RESPONIBLE FOR INVOLVING THE PLAINTIFF IN THE QUESTIONING AND LIE DETECTOR TEST.

DEFENDANT REFUSED TO DISCLOSE THE NAME OF THE INFORMER AT THE TRIAL BELOW,THEREFORE PLAINTIFF HAD NO WAY OF DISPROVING THE ALLEGATION.

NOT IN THE ENTIRE EXISTANCE OF THE DEFENDANT BUSINESS HAS AN INFORMER,BEEN USED IN ANY SITUATION OR KNOWN TO EXIST AMONG ALL THE EMPLOYEES.DEFENDANT COULD SHOW NO EVIDENCE TO THE CONTRARY.

THE INFORMER WAS CREATED TO ATTEMPT TO DISCREDIT THE PLAINTIFF IMPECCABLE REPUTATION.

PLAINTIFF (EX.12) WILL SHOW VARIOUS OTHER AIRLINES WHO DONATE FREE TICKETS TO DEFENDANT CHRISTMAS PARTY. AIR FRANCE,TWA ETC.PLUS DEFENDANT DONATES ITS OWN AIRLINE TICKET,THE SABENA PRIZE WHICH IS THE ONLY PRIZE WITH HOTEL AND LAND ACCOMMODATIONS ADDED.THE YEAR PLAINTIFF WON THE DEFENDANT'S PRIZE THE ADDED PORTION WAS NOT INCLUDED.THE COURT BELOW HELD:"DEFENDANT WAS NOT RESPONSIBLE FOR FAILURE TO RECEIVE THE LAND PART OF THE AWARD."

THE YEAR PRECEEDING AND THE YEAR AFTER PLAINTIFF WON PRIZE,IT WAS WON BY WHITE EMPLOYEES WHO RECEIVED THE ENTIRE AWARD.DEFENDANT TOOK THE RESPONSIBLE TO SEE THAT THE PRIZE WAS COMPLETED IN OTHERS YEARS,WHICH IT HAS COMPLETE CONTROL OVER,BUT WAS FOUND NOT TO BE RESPONIBLE THE YEAR PLAINTIFF WON.

THE COURT BELOW WAS UNDER THE IMPRESSION THAT THE PRIZE THE PLAINTIFF WON WAS DONATED BE ANOTHER AIRLINE OTHER THAN DEFENDANT'S AIRLINE,AND THEREFORE WAS NOT RESPONSIBLE FOR ITS CONTENTS. THE FACT IS,DEFENDANT DESIGNS ITS OWN PRIZE EVERY YEAR AND IS COMPLETELY RESPONSIBLE FOR ITS CONTENT.

DEFENDANT HAS MAINTAINED A POLICY OF ALLOWING THREE DAYS OFF WITH PAY FOR ANY OF ITS EMPLOYEES WHO GET MARRIED. SINCE PLAINTIFF DATE OF EMPLOYMENT ON SEPT 26,1968, PLAINTIFF HAS WITNESSED THE MARRIAGES OF WHITE EMPLOYEES WHO GOT MARRIED AND TOOK THEIR WIVES ON A DEDUCED FARE HONEYNOON WITH SABENA TICKETS AND WERE NEVER ASKED TO PROVE THEIR MARRIAGES LIKE THE PLAINTIFF WAS TOLD TO DO,AND THE CARGO MANAGER MR.SHARMA TESTIFIED TOO.

A TOTAL OF NINE WHITE EMPLOYEES WHO MARRIED SINCE 1968,AND NONE WERE EVER ASKED TO PRODUCE A MARRIAGE CERTIFICATE LIKE THE PLAINTIFF WAS FORCED TO DO.

THAT ACT WAS SUBSTANTIATED BY THE COURT BELOW,AND THE BURDEN OF PROOF AGAIN SHOULD HAVE SHIFTED TO THE DEFENDANT TO SHOW WHAT,IF ANY,EMPLOYEE ABUSED THE MARRIAGE POLICY IN THE PAST,TO WARRENT A CHANGE OF POLICY.AS A POINT OF LAW THE COURT BELOW ERRED IN THAT RESPECT.

<u>ONCE THE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CASE,THE BURDEN OF PROOF SHOULD HAVE SHIFTED TO THE DEFENDANT.</u>

IT WAS ESTABLISHED IN THE COURT BELOW THAT THE SUPERVISOR AND OTHER WORKERS WERE ALLOWED TO PLAY CARDS WHILE THE PLAINTIFF WAS INSTRUCTED TO DO SUBSTANTIALLY ALL THE WORK FOR THE PERIOD INVOLVED.IN VEIW OF THE FACT THAT ALL THE CARD PLAYERS WERE WHITE AND THE PLAINTIFF IS BLACK,AND FORCED TO DO THE WORK OF OTHERS,THE COURT FOUND THAT ACT NOT TO BE DISCRIMINATORY.

AFTER A FIVE YEAR INVESTIGATION,BY THE EEOC,THE DEFENDANT WAS FOUND GUILTY OF VIOLATING TITLE VII OF THE 1964 CIVIL RIGHTS ACT.DEFENDANT REFUSED ANY CONCILIATIONS ATTEMPTS MADE BE THE COMMISSION.

IN THE ORIGINAL EEOC CHARGE THE PLAINTIFF STATED VERY CLEARLY THAT:

> I ONLY DESIRE A CHANGE OF POLICY IN HIRING WITH GOVERNMENT SUPERVISION AND PROMOTIONAL CONDITIONS EQUAL TO ALL EMPLOYEES.ALSO UNNECESSARY QUALIFICATIONS FOR PROMOTION.

AFFIRMATIVE RELIEF

WHERE A EMPLOYER HAS ENGAGED IN AN UNLAWFUL EMPLOYMENT PRACTICE,COURTS IN TITLE VII ACTIONS HAVE AUTHORITY NOT ONLY TO ENJOIN CONTINUATION OF THE PRACTICE BUT ALSO TO ORDER "SUCH AFFIRMATIVE ACTION AS MAY BE APPROPRIATE."

ALTHOUGH AFFIRMATIVE RELIEF IS DISCRETIONARY IN NATURE, THE SUPREME COURT HAS EMPHASIZED THAT:

> "CONGRESS' PURPOSE IN VESTING A VARIETY OF DISCRETIONARY POWERS IN THE COURTS WAS NOT TO LIMIT APPELLATE REVIEW OF TRIAL COURTS, OR TO INVITE INCONSISTENCY AND CAPRICE,BUT RATHER TO MAKE POSSIBLE THE FASHIONING OF THE MOST COMPLETE RELIEF POSSIBLE."

ALBEMARLE PAPER CO. v. MOODY, U.S.,95 S.CT.,2362,2373 (1975)

> " THE COURT HAS NOT MERELY THE POWER BUT THE DUTY TO RENDER A DECREE WHICH WILL SO FAR AS POSSIBLE ELIMINATE THE DISCRIMINATORY EFFECTS OF THE PAST AS WELL AS BAR LIKE DISCRIMINATION IN THE FUTURE." LOUISIANA v. UNITED STATES, 380 U.S. 145 ,154,85 S.CT. 817,822 (1965)

THE FACTS IN THE TRIAL BELOW WILL SHOW THE PLAINTIFF WAS ALWAYS THE FIRST EMPLOYEE TO BE SUBJECTED TO EACH INCIDENT

FIRST TO BE GIVEN A LIE DETECTOR TEST
FIRST TO BE GIVEN A HONESTY TEST,WITH INTENT TO ENTRAP HIM
FIRST TO BE FORCED TO PROVE HIS MARRIAGE
FIRST NOT TO RECEIVE, THE ENTIRE PRIZE HE WON
FIRST TO BE FIRED WITHOUT CAUSE,AND REINSTATED.
FIRST TO BE WARNED OF DISCHARGE,FOR TAKING A TRIP.
FIRST TO BE BYPASSED FOR OVERTIME.
FIRST TO BE QUESTIONED BY THE F.B.I. ON DEFENDANT'S ORDER.
FIRST TO BE QUESTIONED BY TREASURY AGENTS ON DEFENDANT'S ORDERS.
FIRST TO RECEIVE A TELEGRAM OF SUSPENSION,WHICH WAS OVERRULED.

ALL OF THESE ACTS COLLECTIVELY CONSTITUTES AN OVERT ACT OF DISCRIMINATION AGAINST THE PLAINTIFF.

THE BURDEN OF PROOF AGAIN WAS UPON THE DEFENDANT TO COME FORWARD,AND SATISFACTORY EXPLAIN WHY THEY TOOK THE ACCUMULATIVE ACTS WHICH HAPPENED.

THE COURT BELOW HELD:

"FINDING THAT PLAINTIFF HAS FAILED TO SUSTAIN BURDEN OF PROOF IT IS ORDERED."

ONCE THE PLAINTIFF HAS ESTABLISHED A PRIMA FACIE CASE, THE BURDEN SHIFTS TO THE DEFENDANT.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE DECISION OF NOV.23,1976, OF THE COURT BELOW SHOULD BE REVERSED IN ALL RESPECTS AND REMANDED FOR TRIAL.

RESPECTFULLY SUBMITTED,

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